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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1233

JOHN M. LOCKHART, PLAINTIFF AND APPELLEE,

vs.

FRANK MOREY, DEFENDANT AND APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED, OCTOBER 17, 1887.

utory "as it now stands," because "it does not terminate the "litigation between the parties on the merits of the case," and that a decree is final only "*when it leaves nothing to be done* "*but to make the sale and pay out the proceeds.*" The decree appealed from in this case leaves for determination the defenses which affect the income and equipment bonds, all equities of the first mortgage bondholders, the amounts due on the income and equipment bonds, and on the first mortgage main line bond, after applying the rents and profits arising from the operation of the railway through a period of several years. That these cases are not in entire accord, in the judgment of the learned counsel who make this motion, is indicated by the fact that they cite the one last mentioned and omit the first.

In the exercise of abundant caution we have assumed that some of the findings set out in the decree, notably those contained in the first and second divisions, are final. If this is correct, the cause is here for hearing *de novo* on the record on file. If this court shall be of the opinion that the decree is wholly interlocutory, and that the appeal should be dismissed, the appellant will be taxed the costs of the appeal, but neither party will otherwise suffer, as a final decree will be entered on the coming in of the master's report, from which any party can appeal, and secure a hearing here upon the entire record.

The question presented by the motion goes to the jurisdiction and turns exclusively upon the character of the decree. It is well that the question is raised before the argument upon the merits, as the ruling thereon may greatly abridge such argument, or render it unnecessary. The time which will be consumed in the preparation and presentation of arguments covering this record will be wasted if the court has no jurisdiction.

Respectfully submitted.

THOS. F. WITHROW,
For the Appellant.

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1 CIRCUIT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF LOUISIANA.

Transcript from 19th Judicial Court, filed April 27th, 1887.

John M. Lockhart
vs.
Frank Morey. } No. 11,568.

Note filed with Petition.

Received and filed April 1, 1887.
J. B. Verdun, Jr., Clerk.

$6000. NEW ORLEANS, April 1, 1886.

On the first day of January, eighteen hundred and eighty-seven, after date, I promise to pay to the order of myself the sum of Six thousand dollars at the Louisiana National Bank in this city, value received, with interest at the rate of seven per cent. per annum from date, until final payment.

(Signed) FRANK MOREY.

(Endorsed Frank Morey.)
Rec'd and filed Feby. 2, 1887.
J. B. Verdun, Jr., Clerk.

PETITION.

Received and filed April 1, 1887.
J. B. Verdun, Jr., Clerk.

2 To the Honorable the Judge of the Nineteenth Judicial District Court in and for the Parish of St. Mary, State of Louisiana:

The petition of John M. Lockhart, residing in the Parish of St. Mary, with respect represents, that he is the holder and owner of a certain promissory note drawn by Frank Morey, of the Parish of Madison, Louisiana, for the sum of six thousand dollars ($6000), dated April 1st, 1886, and payable January 1st, 1887, made payable to his own order, and by himself endorsed in blank, conditioned to bear interest at the rate of seven per cent. (7%) per annum from its date, which note is hereto annexed and made part hereof.

He avers that payment of this note is secured by special mortgage and vendor's lien on that certain plantation in the Parish of St. Mary, Louisiana, fully described in a certified copy of a notarial act, executed at New Orleans, Louisiana, June 9th, 1866, before Andrew Hero, Notary Public, which copy, with the certificate of the Clerk and *ex-officio* Recorder of the Parish of St. Mary, showing its proper registry in the books of conventional mortgage of the Parish of St. Mary, and are hereto annexed and made part hereof.

He avers that said Morey bound himself in said notarial act to pay the fees of the attorney employed to institute suit upon said note, and that said fees were therein fixed at five per cent. (5%) on the amount sued for.

He avers amicable demand in vain.

He prays that an order of seizure and sale issue
3 from this Honorable Court, and directed to the Sheriff of the Parish of St. Mary, commanding him to seize, after legal delays, the plantation described in the annexed certified copy of the act of mortgage and privilege, together with the sugar house, machinery, fixtures, apparatus and appurtenances thereof, horses, mules, wagons, carts, farming utensils, and all other things thereto attached and used in the cultivation thereof, for cash, to satisfy the promissory note hereto annexed, attorney's fees as set out herein, interest and costs, and for general relief.

By his attorneys,
FOSTER & MENTZ.

ORDER.

Let executory process issue as herein prayed for. Granted at Chambers, this 29th day of March, 1887.

(Signed) A. C. ALLAN,
Judge 19th Judicial District Court.

9TH JUNE, 1886. SALE OF PROPERTY BY JOHN M. LOCKHART AND OTHERS TO FRANK MOREY.

State of Louisiana,
Parish and City of New Orleans.

Be it known, that on this 9th day of June in the year of our Lord one thousand eight hundred and eighty-six and of the Independence of the United States
4 of America, the one hundred and tenth, before me, Andrew Hero, Jr., a Notary Public in and for the Parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared, John M. Lockhart, of the Parish of St. Mary, in this State, herein acting as well in his own name and behalf as also in his capacity as the authorized agent and attorney of Charles Lockhart, of New Zealand, and William Lockhart, Jane Lockhart and Mrs. Mary Ann Lockhart, the wife of lawful age of James Garrett, residents of the County Down, Ireland, by virtue of the several powers of attorney executed by said parties in his favor, on file and of record in the Civil District Court of this Parish, in the matter of the Succession of Isaac Lockhart, No. 2934 of the Docket of said Court; that from said Charles Lockhart, bearing date March 6th, 1877, and having been executed before the Consular agent at Christ Church, New Zealand, and those from Mrs. Mary Ann Garrett and her husband and Jane Lockhart and William Lockhart, were executed on January 31st, 1877, before James Ussher, a commissioner at Lurgan, Armahh County, Ireland, and by each of said grantors, acknowledged on February 1st, 1877, before the United States Consul at Belfast, Ireland. Which said John M. Lockhart declared in his said several capacities, that for the consideration and on the terms and conditions hereinafter expressed, he does, by these presents, grant, bargain, sell, convey, transfer, assign and set over, with all legal warranties, unto Frank Morey, of the Parish of Madison, in this State, here present accepting and purchasing for himself, his heirs and assigns
5 and acknowledging delivery and possession thereof.

All and singular that certain plantation with the buildings and improvements thereon, including the sugar house machinery, fixtures, apparatus and appurtenances thereof, horses, mules, wagons, carts, farming implements and all other things or articles thereto at-

tached and used in the cultivation thereof, situated in the Parish of St. Mary, in this State, fronting on both sides of the Atchafalaya River, about eight miles above Morgan City, formerly styled Brashear City, and being and opposite to the Town of Pattersonville, being composed of two several tracts of land, as delineated or set forth on a plan made by W. H. Johnson, Surveyor, under date of February 5th, 1875, annexed for reference to an act passed before Jules Mossy, late a Notary in this City, on July 7th, 1876. The tract of land situated or lying and being on the east side of said Atchafalaya River, is commonly styled Victoria, and contains one thousand acres, more or less; being bounded above by lands belonging to J. J. Davenport, formerly the estate of D. Robbins, and below by lands of Topham; and the tract of land lying on the west side of said Atchafalaya River is separated in part from said river by the Town of Pattersonville, is known as the Viego tract, and is bounded above by lands formerly belonging to the estate of D. Robbins, now laid off into lots and squares and known as Freetown or Tibbville, and below by lands of Joseph Broussard, formerly belonging to Grant and Sanders, and contains six hundred and fifty superficial arpents, more or less, said property was purchased by
Isaac Lockhart and John M. Lockhart from L. Du-
6 bart and the Succession of Louis F. Generes and
Louis Dubart, by two several acts passed before Jules Mossy, late a Notary in this City, on July 7th, 1876; and upon the demise of said Isaac Lockhart, his share therein became vested in the present vendors, as is shown and set forth in the proceedings had in the Civil District Court of this Parish under the number 2934 of its Docket.

To have and to hold the said property and appurtenances unto the said purchaser, his heirs and assigns forever. And the said John M. Lockhart hereby binds himself and his heirs and his aforesaid constituents and their heirs to warrant and forever defend the herein conveyed property and appurtenances in the quiet and peaceable possession of said purchaser, his heirs

and assigns, against the claim and demands of all persons whomsoever.

Said Lockhart moreover transfers unto the present purchaser all the rights and actions of warranty to which he and his aforenamed constituents are or may be entitled against all former proprietors of the herein described property and appurtenances, subrogating said purchaser to the said rights and actions to be by him enjoyed and exercised in the same manner as they might have been by the same vendors.

This sale is made and accepted for and in consideration of the price and sum of twenty-nine thousand dollars, with interest as hereinafter expressed: six thousand dollars of which said price has been paid in cash ready current money at the execution hereof and in the presence of the undersigned notary and witnesses by said purchaser unto said Lockhart, and for
7 the balance of said price the said purchaser has furnished five certain promissory notes drawn by him to his own order and endorsed by himself, dated the first day of April, eighteen hundred and eighty-six, bearing interest at the rate of seven per cent. per annum from their date until final payment and made payable as follows, viz: One thereof for the sum of six thousand dollars on the first day of January, eighteen hundred and eighty-seven, and the other four of said notes being for the sum of four thousand two hundred and fifty dollars each, at twenty-one, thirty-three, forty-five and fifty-seven months respectively after date, and all being domiciliated at the Louisiana National Bank in this city; which said notes after having been paraphed by me, said Notary, for identification herewith, were delivered unto said Lockhart who, in his aforesaid several capacities, hereby acknowledges their receipt as well as the said ready current money.

And in order to secure the full and punctual payment of said promissory notes at their respective maturities, as well as of all interest to accrue thereon, and in order furthermore to secure the payment and reimbursement of any and all lawyer's fees that may be expended or incurred in the event of suit being instituted to enforce

the payment of said notes or either of them, in principal or interest or any part thereof (which lawyer's fees, however, are fixed at five per cent. on the amount in suit, and said purchaser consents and agrees to pay and allow the same), the said Morey hereby specially mortgages, affects and hypothecates the herein described and
8 conveyed property and appurtenances unto and in favor of said vendors, as well as of any and all future owner or owners of said notes or either of them, promising and binding himself and his heirs not to alienate, deteriorate nor encumber the said property to the prejudice of this mortgage nor of the special vendor's lien and privilege which the aforesaid vendors hereby retain on said property until the full and final payment of said notes, with the distinct understanding, however, that the portion of the aforesaid Viego tract lying east of Morgan's Louisiana & Texas Railroad and bounded on the west by said Railroad, east by said town of Pattersonville and the Public Road near the Atchafalaya, north by Freetown or Tibbville and south by lands of Broussard, shall not be affected or burthened by or with the aforedescribed notes of four thousand two hundred and fifty dollars each, payable at thirty-three, forty-five and fifty-seven months. And the note for six thousand and that for four thousand two hundred and and fifty dollars, payable at twenty-one months, shall bear not only on said portion of said Viego tract, but also upon all the hereinbefore described and herein conveyed property. Also that said purchaser may from time to time sell part or portions of said Viego tract embraced between said Railroad and said Public Road near the Atchafalaya River and town of Pattersonville, and the application of the proceeds of such sales to the payment of said note of four thousand two hundred and fifty dollars, payable at twenty-one months, shall free and discharge the property so sold from the operation of the mortgage securing its payment, and said Lockhart
9 or any other holder of said note shall grant a release of said mortgage as regards the portion sold upon notification to that effect, provided that no sales be executed prior to January 4th, 1887, nor before

said note of six thousand dollars in principal and interest shall have been paid, and no part of said excepted portion of ground shall be sold at a less rate than fifty dollars per acre, except by consent of the said vendors or the holder of the aforesaid note of four thousand two hundred and fifty dollars, payable at twenty-one months. It is agreed by and between the parties hereto, that there shall be reserved from any sale of the aforesaid Viego tract embraced between said Railroad and the Atchafalaya River and the upper line of Tibbville and the lower line of Broussard, sufficient land that may serve as a wagon road, railroad and ditch for water for the cultivation of rice, from the River to the rear portion of the said Viego tract, which reservation shall continue in force until all the notes herein given shall have been paid.

And said purchaser moreover promises and binds himself to cause the buildings and improvements on the herein conveyed lands to be kept so insured against the risk of fire by one or more of the Insurances Companies of this City, in the sum of fifteen thousand dollars until the full and final payment of the aforedescribed notes, and to transfer and assign the policies thereof unto whomsoever may be the future owner or owners of said notes or of either of them.

And here the parties to this act declared that they dispense with the production of a certificate from the Clerk of Court and ex-officio recorder of Mortgages of and for said Parish of St. Mary, in this State for annexation hereto, as otherwise required by law to show what if any mortgages or other incumbrances exist against said herein conveyed lands, in the name of present vendors.

And the present purchaser assumes the payment of all taxes demandable against said property for the present year, and said Lockhart hereby declares that all anterior taxes have been paid.

Thus done and passed in my office, in said city of New Orleans, in presence of Messrs. John J. Ward and Eugene Dowty, competent witnesses, both of this city, who hereto

sign their names with the said parties and me, Notary, on the day and date aforesaid.

Original signed:
JNO. J. WARD,
EUGENE DOWTY,
FRANK MOREY,
JNO. M. LOCKHART,
ANDREW HERO, JR.,
Not. Pub.

A true copy of the original act on file, and of record in my office. New Orleans, June 28, 1886.

(Signed) ANDREW HERO, JR.,
Not. Pub.

Clerk's Office: St. Mary Parish, Louisiana.

I certify the foregoing to be a true and correct copy of the act of sale from John M. Lockhart et als. to Frank Morey, recorded in book 31 of Mortgages, page 31, entry No. 19725, of my office, inscribed therein on the 29th day of June, 1886.

In evidence whereof, witness my hand and official seal this 2d day of Feby. A.D. 1887

(Signed) J. B. VERDUN, JR.,
Clerk.

Rec'd and filed Feby. 2d, 1887.

(Signed) J. B. VERDUN, JR.,
Clerk.

ORIGINAL NOTICE TO PAY.

Rec'd and filed April 9, 1887. J. B. Verdun, Jr., Clerk.

STATE OF LOUISIANA.

John M. Lockhart vs. Frank Morey } 19th Judicial District Court, No. 8372. Parish of St. Mary.

To Frank Morey, of the Parish of Madison, State of Louisiana:

Take notice, that whereas, John M. Lockhart, of the Parish of St. Mary, has filed in this Honorable Court his petition setting forth that he is the holder and owner of a certain promissory note drawn by you for the sum of six thousand dollars, dated April 15th, 1886, and payable January 1st, 1887, made payable to the order of and by you endorsed in blank, conditioned to bear interest at the rate of seven per cent. from its date until paid, together with 5% attorney's fees in case of suit, which

said note is now due and unpaid and its payment is secured by special mortgage and vendor's lien and privilege on the following described property,
12 to-wit: all and singular that certain plantation with the buildings and improvements thereon including the sugar-house, machinery, fixtures, apparatus and appurtenances thereof, horses, mules, wagons, carts, farming implements and all other things or articles thereto attached and used in the cultivation thereof, situated in the Parish of St. Mary in this State, fronting on both sides of the Atchafalaya River, about eight miles above Morgan City, formerly styled Brashear City, and being adjacent and opposite to the town of Pattersonville, being composed of two several tracts of land as delineated or set forth on a plan made by W.W. Johnson, surveyor, under date of February 5th, 1875, annexed for reference to an act passed before Jules Mossy, late a Notary in this city, on July 7th, 1876.

The tract of land situated or lying and being on the east side of said Atchafalaya River is commonly styled Victoria, and contains one thousand acres, more or less, being bounded above by lands belonging to J. J. Davenport, formerly the estate of D. Robbins, and below by lands of Topham and the tract of land lying on the west side of said Atchafalaya River, is separated in part from said river by the Town of Pattersonville, is known as the Viego tract, and is bounded above by lands formerly belonging to the estate of D. Robbins, now laid off into lots and squares, and known as Freetown or Tibbiville, and below by lands of J. Broussard, formerly belonging to Groat and Sanders, and contains six hundred and fifty superficial arpents, more or less.

And whereas, an order of seizure and sale has
13 been granted by the Honorable the Judge of the Nineteenth Judicial District Court, bearing date the 29th day of March, 1887, in accordance with the prayer of said petitioner.

Now, therefore, you are hereby notified that unless you pay or cause to be paid, or satisfy, or cause to be satisfied said claim or mortgaged note held by said John M. Lockhart, which note is now due as well as all interest and

5 % attorney's fees and costs, within three days from the service hereof, allowing one additional day for every twenty miles from your residence to the residence of the Judge granting the order.

The Sheriff of the Parish of St. Mary, by virtue of a writ of seizure and sale issued out of the said Court, shall proceed to seize and sell according to law for cash a sufficient amount to satisfy the note now due, amounting to six thousand dollars with interest, attorney's fees and costs, and on terms of credit corresponding with the maturities of the unmatured notes, all and singular the property above described, comformably with plaintiff's petition.

Witness the Honorable A. C. Allan, Judge of said Court, this 1st day of April, 1887.

(Signed) J. B. VERDUN, JR.,
Clerk of said Court.

Received, 4th day of April, 1887, and on the 6th day of the same month and year, service on the within named Frank Morey, at domicile, by handing certified copy of this notice to Mrs. Fanny Morey, wife of Frank Morey,
at and residing at the domicil of the said Frank
14 Morey, in this Parish, about 14½ miles from Tallulah. I know the name of the said wife by interrogating.

Sheriff's office, Madison Parish, April 6th, 1887.

JAMES CLEMENTS,
Dy. Sheriff.

Service $00.50
Mileage 2.90

$ 3.40

OPPOSITION OF FRANK MOREY.

19th Judicial District Court, Parish of St. Mary.

No. 8372.

John M. Lockhart
vs.
Frank Morey.

Now comes into Court through undersigned counsel, defendant, who files this opposition to plaintiff's action,

and says that he was a citizen of the State of Louisiana at the date of the filing of the above suit and service of process therein on him and still is such citizen, and the said John M. Lockhart, plaintiff, was at the date of filing said suit, and still is an alien citizen of the Kingdom of Great Britain, and he further says that said Lockhart has caused a notice to be served on him that executory process would issue on a note of six thousand dollars,
drawn by your defendant and opponent, dated April
15 first, 1886, payable to the order of defendant and opponent on first January, 1877, and endorsed and secured by vendor's privilege and special mortgage on a certain sugar plantation in the Parish of St. Mary, fully set forth in a copy of said notice herewith filed and made part hereof, whereby it appears that if defendant and opponent does not pay in the time set out in said notice, the property set out therein will be seized and sold to satisfy the aforesaid note, principal, interest, costs and attorney's fees.

Your defendant and opponent says that no writ of seizure and sale can issue, as the Judge who grants what is claimed to be an order of seizure and sale, only granted an order of seizure, authorizing the Sheriff to seize, but not to sell.

Further, that concurrently with the notarial act of sale and mortgage on which the alleged order of seizure and sale is based and by act before the same notary, it was agreed that Lockhart, the vendor of defendant and opponent, should remain in charge of the plantation and property sold, and same should be managed and controlled by him until first January, 1887, and that said Lockhart would advance all money and supplies necessary to carry on said plantation to said time and necessary to carrying on the refining of syrups with and by the machinery and apparatus therein, and that he should sell and dispose of the crops grown on said plantation during his control and management thereof, and apply the proceeds thereof as well as the revenues derived from refining syrups: first, to the payment of the advances and interest, and, second, to the payment of the note

of six thousand dollars sued on, which appears by
16 a duly certified copy of said notarial act with certificate of registry attached, herewith filed and made part hereof, marked B. And your opponent and defendant says that the aforesaid concurrent act was and is, to all intents and purposes, a part and parcel of the act of sale and mortgage. Your opponent and defendant says that said Lockhart took charge and controlled the property mortgaged, managed same during the year 1886; made the advances to carry same on, sold the crop, obtained the proceeds, appropriated them to his use. And defendant and opponent says that said Lockhart expended money uselessly and injudiciously in his management of said plantation, and more than he was authorized to do by the terms of aforesaid agreement, and that the matter of account relative to said management and the application of the proceeds of the crop of 1886 remained unadjusted between your opponent and said Lockhart; and he says and avers that on proper rendition of and adjustment of accounts, cutting down or rejecting unauthorized expenditures and giving proper credit for the proceeds of the crop and refinery, and applying the surplus proceeds over expenditures, of which there might be a considerable amount, to the note sued on, as stipulated in said agreement, the same would be paid or largely reduced. And your defendant and opponent says that the management and control of said plantation by said Lockhart was grossly defective, injudicious and extravagant: that he at great expense prepared, by fall plowing and cultivation, a large amount of land to be planted in sugar cane and failed to put up and preserve the said cane necessary to plant same,
17 whereby not only was a useless expenditure incurred, but defendant and opponent was prevented from planting a fair crop of cane for this present year, thereby damaging him to the extent of three thousand dollars in the loss of upwards of 30 acres of cane.

And he further says, that when he bought the plantation from Lockhart, the latter as an inducement to the purchase assured him that there were seventy (70) acres of cane planted and growing on the plantation, when in

point of fact there were only fifty acres; and further represented to him that the amount required to be expended to make the crop and harvest the same, put in order the machinery and defray all plantation expenses, was nine thousand dollars, and that he has been informed and so alleges that the sum alleged to be expended for said purposes is about sixteen thousand dollars.

And he further says, that said Lockhart falsely represented to him as inducement to the purchase of said plantation, that the amount, inclusive of what had been expended up to the sale, to continue the cultivation of the crops and harvest same, would not exceed the sum of nine thousand dollars, and that the revenues from the crops and the refinery would easily meet the payment of the notes as they fell due; which representations said Lockhart knew to be false, when he made them.

Further, defendant and opponent says that that part of the plantation and portions of the Viego tract, lying east of Morgan's Louisiana and Texas Railroad, and bounded on the west by said railroad, east by the Town of
18 Pattersonville and the public road near the Atchafalaya River, north by Freetown or Tibbville, and south by land of Broussard, is excepted from the mortgage granted to secure the payment of the unmatured notes set out in the mortgage act, notwithstanding which the order of seizure and sale embraces said lands; and he further says, that the whole property mortgaged is ordered to be sold to satisfy the note of six thousand dollars for cash, when in law the order could only be granted to sell for cash to satisfy the matured note of six thousand dollars, and on credit to correspond with the maturity of the unmatured notes.

And your opponent says, that in the aforesaid act of sale and mortgage the said Lockhart purports to act as the agent of certain co-owners of the property sold, and that no seizure and sale can issue in the absence of notarial proof of said agency, of which there is none attached to the copy of the act of sale and mortgage, nor any other writing to show said agency.

And your opponent and defendant says, it will work

him irreparable injury to have his property seized and sold under the illegal process of said Lockhart in the action herein. He avers that he has been damaged by the acts and representations of said Lockhart herein set out and the wrongful suing out of these proceedings against him in the sum of three thousand dollars.

Wherefore, he prays this opposition be filed, that John M. Lockhart be cited, that in due course the order of seizure and sale be set aside and cancelled. He prays that he have judgment in reconvention against John M. Lockhart for the sum of three thousand dollars, with 5 % interest per annum from judicial demand, and
19 for general relief.

ROUSE & GRANT.
D. CAFFERY.
Of Counsel.

ORDER.

Let the opposition of Frank Morey be filed as prayed for, and let service thereof and citation be made as pray for.

Granted in Chambers this 26th day of April, 1887.

(Signed) A. C. ALLAN.
Judge 19th Judicial District.

John M. Lockhart } State of Louisiana,
vs. } 19th Judicial District Court,
Frank Morey. } No. 8372, Parish of St. Mary.

To Frank Morey, of the Parish of Madison, State of Louisiana:

Take notice that, whereas, John M. Lockhart, of the Parish of St. Mary, has filed in this Honorable Court his petition setting forth that he is the holder and owner of a certain promissory note, drawn by you for the sum of six thousand dollars, dated April 15th, 1886, and payable January 1st, 1887, made payable to the order of and by you endorsed in blank, conditioned to bear interest at the rate of seven per cent. from its date until paid, together with 5 % attorney's fees in case of suit,
20 which said note is now due and unpaid, and its payment is secured by special mortgage and vendor's lien and privilege on the following described

property, to-wit., all and singular that certain plantation, with the building and improvements thereon, including the sugar house, machinery, fixtures, apparatus and appurtenances thereof, horses, mules, wagons, carts, farming implements, and all other things or articles thereto attached and used in the cultivation thereof, situated in the Parish of St. Mary, in this State, fronting on both sides of the Atchafalaya River, about eight miles above Morgan City, formerly styled Brashear City, and being adjacent and opposite to the Town of Pattersonville, being composed of two several tracts of land, and delineated as set forth on a plan made by W. W. Johnson, Surveyor, under date of February 5th, 1875, annexed for reference to an act passed before Jules Mossy, late a Notary in this City, on July 7th, 1876.

The tract of land situated or lying and being on the east side of said Atchafalaya river is commonly styled Victoria, and contains one thousand acres, more or less, being bounded above by lands belonging to J. J. Davenport formerly the estate of D. Robbins, and below by land of Tophan; and the track of land lying on the west side of said Atchafalaya river is separated in part from said river by the town of Pattersonville, is known as the Viego tract, and is bounded above by the lands formerly belonging to the estate of D. Robbins, now laid off into lots and squares, is known as Freetown or Tibbville, and below by lands of Joe Broussard, formerly belonging to Groat and Sanders, and containing six hundred and
21 fifty superficial arpents, more or less, and whereas, an order of seizure and sale has been granted by the Honorable the Judge of the 19th Judicial District Court, bearing date the 29th day of March, 1887, in accordance with the prayer of said petition.

Now, therefore, you are hereby notified that unless you pay or cause to be paid or satisfy or cause to be satisfied said claim or mortgaged note held by said John M. Lockhart, which note is now due, as well as all interest and 5% attorney's fees and costs, within three days from the service hereof, allowing one additional day for every twenty miles from your residence to the residence of the Judge granting the order—the sheriff of the Parish of St.

Mary, by virtue of a writ of seizure and sale issued out of the said Court, shall proceed to seize and sell according to law for cash a sufficient amount to satisfy the note now due amounting to six thousand dollars with interest, attorney's fees and costs, and on terms of credit corresponding with the maturity of the unmatured notes, all and singular the property above described conformably with plaintiff's petition.

Witness, the Honorable A. C. Allan, Judge of said Court this 1st day of April A. D. 1887.

(Signed) J. B. VERDUN,
Clerk of said Court.

John M. Lockhart
vs.
Frank Morey

No. 8372.
19th Judicial District Court, Parish of St. Mary, State of Louisiana.

22 To the Honorable the Judge of said Court:

The petition of Frank Morey, defendant, in said suit and plaintiff by opposition therein, respectfully shows that he was a citizen of the State of Louisiana at the date of the filing of the suit and service of process therein upon him, and still is such citizen, and that the said John M. Lockhart, plaintiff, was at the date of filing such suit and still is an alien citizen of the Kingdom of Great Britain; that there is a controversy in said suit between your petitioner and the said John M. Lockhart, and that the matter in dispute therein, exclusive of costs, exceeds the sum of twenty-five hundred dollars, and that your petitioner desires to remove said suit to the Circuit Court of the United States for the Fifth Judicial Circuit and Eastern District of Louisiana.

Wherefore, petitioner prays acceptance of the surety upon the bond herewith filed, and that this suit be removed to said United States Circuit Court, in accordance with the Acts of Congress in such cases made and provided, and that further proceedings in this Court be stayed.

(Signed) FRANK MOREY.

The Court refuses the order of removal asked for in the above entitled case, for the following reasons: An order of seizure and sale in a proceeding via executiva on a

mortgage importing a confession of judgment is a judgment, and after its rendition such a proceeding is not removable from the State to the Federal Court,
23 and for the further reason, that the Court thinks that the right to remove is personal to the non-resident defendant in this opposition—the order of removal herein asked for is hereby refused.

Rendered at Chambers this 26th day of April, A. D. 1887.

(Signed) A. C. ALLEN,
Judge of 19th Judicial District Court.

John M. Lockhart vs. Frank Morey. } 19th Judicial District Court for the Parish of St. Mary, State of Louisiana. No. 8372.

Know all men by these presents, that Mr. Frank Morey as principal, and Ben J. Morey as surety, are held and firmly bound unto John M. Lockhart, his heirs, executors, administrators and assigns in the sum of five hundred dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators firmly by these presents.

Whereas, the above bounden, Frank Morey, has this day filed a petition in said suit of John M. Lockhart versus Frank Morey, No. 8372 of the Docket of said 19th Judicial District Court for the Parish of St. Mary, State of Louisiana, praying for the removal of said suit to the Circuit Court of the United States for the Fifth Judicial Circuit and Eastern District of Louisiana.

Now the condition of this bond is such, that if the above bounden Frank Morey shall enter and file
24 in the said Circuit Court on the first day of its next session or term a copy of the record of said suit, and shall pay all costs that may be awarded against him by the said Circuit Court, if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

Dated at Franklin, St. Mary Parish, this 26th day of April, 1887. (Signed) FRANK MOREY,
B. J. MOREY.

State of Louisiana, }
Parish of St. Mary. }

I hereby certify that the foregoing 19 pages contain a true and correct transcript of all papers filed, proceedings had and evidence adduced in the suit wherein John M. Lockhart is plaintiff and Frank Morey is defendant, No. 8372 of the Docket of the 19th Judicial District Court, in and for the Parish of St. Mary.

In evidence whereof, witness my hand and official seal this 26th day of April, A. D. 1887.

[SEAL] (Signed) J. B. VERDUN, JR.,
Clerk 19th Judicial District Court, St. Mary Parish, La.

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25 RULE TO QUASH WRIT OF SEIZURE AND SALE.

Entered and filed 5th May, 1887.

John M. Lockhart } No. 11,568,
vs. } U. S. Circuit Court,
Frank Morey. } Eastern District of Louisiana.

Upon motion of Rouse & Grant, Solicitors for defendant in above named case, suggesting that this cause was removed from the 19th Judicial District Court, in and for the Parish of St. Mary, in this State, into this Honorable Court the 26th day of April, 1887, at which time the delay allowed by law to the defendant to enjoin the issuance of the writ of seizure and sale, or to appeal from the order granting the same in said cause, had not expired, and upon further suggesting that notwithstanding said removal of the cause to this Honorable Court, and that said District Court was thereby divested of jurisdiction thereof, and that the delay accorded to defendant as aforesaid had not expired, the clerk of said District Court issued a writ of seizure and sale, and by pretended authority of said writ the Sheriff of said Parish hath seized the plantation of said defendant, described in the record of this cause and advertised the same for sale.

It is ordered that said plaintiff show cause on Wednesday, the 11th day of May, 1887, why said writ of seizure and sale should not be quashed, and said seizure released, and said sale so advertised enjoined and prohibited.

26 MARSHAL'S RETURN.

Received May 6th, 1887, and on the 7th May, 1887, I served a true copy of the within rule on John M. Lockhart, by handing same to him in person at his domicil, in the Parish of St. Mary, Louisiana, 87 miles from New Orleans, and leaving same in his hands.

(Signed) R. B. PLEASANTS,
U. S. Marshal.

MOTION TO REMAND.

Entered and filed 11th May, 1887.

J. M. Lockhart
vs.
Frank Morey.

No. 11,568
United States Circuit Court, Fifth Circuit and Eastern District of La.

On motion of White & Saunders, Attorneys for J. M. Lockhart, plaintiff in the above entitled and numbered suit, and on suggesting to the Court that the defendant herein has improperly offered to remove this case from the 19th District Court, in and for the Parish of St. Mary, State of Louisiana, where it was commenced and is still pending, and that the said defendant is not entitled to remove said case from said Court into this Court:

It is ordered that the said defendant, Frank Morey, show cause in this Court on Wednesday, the 11th
27 day of May, 1887, why this case should not be remanded to the said 19th District Court, in and for the Parish of St. Mary, State of Louisiana.

HEARING AND SUBMISSION TO MOTION TO REMAND.

Extract from the Minute Book, April Term, 1887.

NEW ORLEANS, Wednesday, May 11th, 1887.

Court met persuant to adjournment.

Present: Honorable Edward C. Billings, District Judge.

John M. Lockhart
vs.
Frank Morey.

No. 11,568.

This cause came on to be heard on the motion to remand herein filed by the plaintiff, White & Saunders appearing for mover; Rouse & Grant for defendant; and

was argued by counsel for the respective parties and submitted—and the Court took time to consider.

Rule to quash seizure and sale continued indefinitely.

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28 Extract from the Minute Book, April Term, 1887.

NEW ORLEANS, Wednesday, May 11th, 1887.

Court met pursuant to adjournment.

Present: Honorable Edward C. Billings, District Judge.

John M. Lockhart
vs. } No. 11,568.
Frank Morey.

By agreement of counsel for both parties, with leave of the Court first had and obtained, defendant's rule herein to quash the writ of seizure and sale herein and to release the seizure and the sale advertised, enjoined and prohibited, is continued indefinitely.

ORDER TO REMAND REFUSED.

Extract from the Minute Book, April Term, 1887.

NEW ORLEANS, Saturday, May 28th, 1887.

Court met pursuant to adjournment.

Present: Honorable Edward C. Billings, District Judge.

29 John M. Lockhart
vs. } No. 11,568.
Frank Morey.

This cause came on at this term to be heard on the motion of the plaintiff to remand said cause to the 19th Judicial District Court, in and for the Parish of St. Mary, State of Louisiana, whence it was removed to this Court, and was argued by counsel and submitted. On consideration whereof, it is ordered that said motion be refused.

MOTION TO FIX RULE TO QUASH.

Entered and Filed May 28th, 1887.

John M. Lockhart
vs. } No. 11,568.
Frank Morey.

United States Circuit Court,
Eastern District of Louisiana.

Upon motion of Rouse & Grant, Solicitors for de-

fendant, it is ordered that the rule herein to quash the writ of seizure and sale, and enjoin the execution thereof, be assigned for hearing Tuesday, May 31st, 1887, and that plaintiff be notified.

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30 NOTICE OF TRIAL. Issued May 28th, 1887.

CIRCUIT COURT OF THE UNITED STATES.

For the Fifth Judicial Circuit and Eastern District of Louisiana.

John M. Lockhart
vs. } No. 11,568.
Frank Morey.

Your are hereby notified that the rule to quash the writ of seizure and sale and enjoin the execution in this case is assigned for trial for Thursday, the 31st day of May, A. D. 1887, at 11 o'clock, A. M., by order of Court.

Witness my hand and seal of the said Court, at New Orleans, this 28th day of May, A. D. 1887.

[SEAL] (Signed) E. R. HUNT,
Clerk.
by H. J. CARTER,
Dy. Clerk.

To Messrs. White & Saunders, Esqs.:

MARSHAL'S RETURN.

Received May 28th, 1887, on the same day, month and year, I served a true copy of within notice of trial on White & Saunders, by handing same to Mr. White in person. (Signed) R. B. PLEASANTS,
U. S. Marshal.
by D. J. DELANY,
Dy. Marshal.

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31 CONTINUANCE OF RULE TO QUASH, ETC.

Extract from the Minute Book, April Term, 1887.

NEW ORLEANS, Tuesday, May 31st, 1887.

Court met pursuant to adjournment.

Present: Honorable Edward C. Billings, District Judge.

John M. Lockhart
vs. } No. 11,568.
Frank Morey

By agreement of counsel for both parties, with leave of the Court first had and obtained, this cause goes over until to-morrow, at 11 A. M., to be heard on the rule of the defendant to quash the writ of seizure and sale, and to enjoin the execution thereof.

MOTION FOR NEW TRIAL AND REHEARING OF MOTION TO REMAND.

Entered and filed 1st June, 1887.

J. M. Lockhart
vs.
Frank Morey.

No. 11,568.
United States Circuit Court,
for Eastern District of Louisiana.

On motion of said J. M. Lockhart, plaintiff in
32 above entitled and numbered suit, through White & Saunders, his attorneys.

And on suggesting to the Court: That the decision and judgment of this Honorable Court on the motion herein made to remand this case to the State Court, from which the defendant herein has attempted to remove it into this Court, was erroneous and contrary to law and was in conflict with the jurisprudence of the Supreme Court of the United States, as settled in the cases of *King vs. Cornell, 106 U. S. p. 395, and United States vs. Tynen, 11 Wall. p. 88.*

That in view of the importance of the question involved herein and the large interests that will be affected by the decision herein as determining the course and jurisdiction of this Court, not only in the instant case, but in other cases, it is extremely desirable that said jurisdictional question should be more thoroughly presented and argued than has been done.

It is ordered that said defendant, Frank Morey, show cause in this Court, on Wednesday, June 1st, 1887, at 11 A. M., why a new trial and rehearing of the motion herein made to remand should not be made.

HEARING AND SUBMISSION OF MOTION FOR NEW TRIAL AND REHEARING OF THE MOTION TO REMAND.

Extract from the Minute Book, April Term, 1887.

33 NEW ORLEANS, Wednesday, June 1st, 1887.

Court met pursuant to adjournment.

Present: Honorable Edward C. Billings, District Judge.

John M. Lockhart
vs. } No. 11,568.
Frank Morey.

This cause came on this day to be heard on the plaintiff's motion for new trial and rehearing of the motion to remand, White & Saunders appearing for plaintiff; Rouse & Grant for the defendant, and was argued by counsel and submitted—when the Court took time to consider.

CONTINUANCE OF RULE TO QUASH WRIT OF SEIZURE AND SALE.

Extract from the Minute Book, April Term, 1887.

NEW ORLEANS, Wednesday, June 1st, 1887.

Court met pursuant to adjournment.

Present: Honorable Edward C. Billings, District Judge.

John M. Lockhart
vs. } No. 11,568.
Frank Morey.

34 By agreement of counsel for both parties, with the leave of the Court first had and obtained, this cause is continued until to-morrow, at 11 A. M., to be heard on the defendant's rule to quash the writ of seizure and sale and to enjoin the execution thereof.

MOTION FOR NEW TRIAL FIXED FOR JUNE 4.

Extract from the Minute Book, April Term, 1887.

NEW ORLEANS, Thursday, June 2d, 1887.

Court met pursuant to adjournment.

Present: Honorable Edward C. Billings, District Judge.

John M. Lockhart
vs. } No. 11,568.
Frank Morey.

It is ordered by the Court that the plaintiff's motion for a new trial and rehearing of the motion to remand in this cause be set down for Saturday, June 4th, at 11 A. M., to be heard before their Honors the Circuit and District Judges.

35 ORDER—RULE TO QUASH—MADE ABSOLUTE.

Circuit Court of the United States, Eastern District of Louisiana.

Extract from the Minute Book, April Term, 1887.

NEW ORLEANS, Thursday, June 2d, 1887.

Court met pursuant to adjournment.

Present: Honorable Edward C. Billings, District Judge.

John M. Lockhart } No. 11,568.
vs. } U. S. Circuit Court, E. D. La.
Frank Morey. }

The rule herein taken by the defendant May 5th, 1887, to quash the writ of seizure and sale issued by the Clerk of the 19th Judicial District Court, Parish of St. Mary, herein, and to release the seizure made by the Sheriff of said Parish, and to enjoin and to prohibit the sale thereunder of the defendant's plantation, came on to be heard and was argued by counsel; whereupon, and upon consideration thereof, it was ordered, adjudged and decreed that said rule be made absolute, and that accordingly said writ of seizure and sale be and the same is hereby quashed; and it was further ordered that the
36 Sheriff of said Parish do forthwith release the seizure of said plantation made by him under said writ, and that he refrain from further proceeding thereunder and from selling said plantation by pretended authority thereof; and it is further ordered that said John M. Lockhart be and he is hereby enjoined and prohibited from taking or causing to be taken any further proceedings under said writ.

Clerk's Office:

I certify the foregoing to be a true copy from the original record in this office.

Witness, my hand and seal of said Court, at the City of New Orleans, this 3d day of June, 1887.

[SEAL] (Signed) E. R. HUNT,
Clerk.

MARSHAL'S RETURN.

Received June 3d, 1887, and on the same day, month and year, I served true copies of within restraining order on John M. Lockhart, by handing same to him in person,

in the City of New Orleans; Sheriff of Parish of St. Mary, by handing same to him (Mr. Frere) in person, in the Parish of St. Mary, La., 105 miles from New Orleans.

(Signed) R. B. PLEASANTS,
U. S. M'l.
by DAN A. ROSE,
Dy. U. S. Marshal.

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37 HEARING AND SUBMISSION OF PLAINTIFF'S MOTION FOR NEW TRIAL.

Extracts from the Minute Book, April Term, 1887.

NEW ORLEANS, Saturday, June 4th, 1887.

Court met pursuant to adjournment.

Present: Honorable Don A. Pardee, Circuit Judge; Edward C. Billings, District Judge.

John M. Lockhart } No. 11,568.
vs. }
Frank Morey. }

This cause came on to be heard before the Circuit and District Judges on the plaintiff's motion for a new trial and rehearing of the motion to remand herein. Present: White & Saunders for plaintiff; Rouse & Grant for the defendant; and was argued by counsel for the parties respectively and submitted—and the Court took time to consider.

RULE FOR CONTEMPT.

Entered and filed June 16th, 1887.

John M. Lockhart } No. 11,568.
vs. } U. S. Circuit Court.
Frank Morey. } Eastern District of La.

38 Upon motion of Rouse & Grant, Solicitors for the defendant, suggesting that A. G. Frere, Sheriff of the Parish of St. Mary, Louisiana, was served with a copy of the order of this Honorable Court, made the 2d instant, quashing the writ of seizure and sale issued by the Clerk of the 19th Judicial District Court, enjoining and prohibiting further proceedings under said writ; and commanding him to release, and said plaintiff to cause to be released, the seizure of the defendant's plantation thereunder, and that said plaintiff was also duly served

with a copy of said order; and upon further suggesting that said Sheriff has refused to release said plantation from seizure, and is incited to such disobedience of the order of this Honorable Court by said plaintiff, and that said Sheriff and said Lockhart are acting in defiance and contempt of this Honorable Court, it is ordered that said A. G. Frere and said John M. Lockhart do appear before this Honorable Court, Saturday, the 18th day of June, 1887, at 11 o'clock A. M., and show cause, if any they can, why they should not be punished for such contempt and disobedience of the mandates of this Honorable Court.

MARSHAL'S RETURN.

Received June 16th, 1887, on the 17th day of June, 1887, I served a true copy of the within order on A. G. Frere, at Franklin, Louisiana, 105 miles from New Orleans, by handing the same to him in person same day. Served J. M. Lockhart at Jeannerette, La., 85 miles from New Orleans, by handing the same to him in person.

(Signed) R. B. PLEASANTS,
U. S. Marshal, Eastern District of Louisiana.
by DAN A. ROSE,
Dy. U. S. Marshal.

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39 CERTIFICATE OF DIVISION OF OPINION ON MOTION TO REMAND.

Entered and Filed 16th June, 1887.

John M. Lockhart
vs.
Frank Morey.

No. 11,568.
Circuit Court of the United States
for the Fifth Circuit and
Eastern District of Louisiana.

This case was brought in a State Court, viz., in the District Court for St. Mary Parish, State of Louisiana. The plaintiff is a citizen of Great Britain, and the defendant is a citizen and resident of the State of Louisiana.

The said defendant petitioned the said State Court to remove said suit into this Court, but the said State Court refused to grant the removal. Thereupon the said defendant obtained and filed in this Court a certified copy of the proceedings in said suit in said State Court. Then

the said plaintiff in said suit moved, immediately after the filing of said transcript in this Court, to remand said suit from this Court into the said Court of the State of Louisiana in which it was instituted.

Said motion to remand came up for hearing, and was tried and argued in this Court before Honorable Don A. Pardee, Circuit Judge for the Fifth Circuit Court of the United States, and Honorable Edward C. Billings, District Judge for District Court of the United States, for the Eastern District of Louisiana, on June, 4th, 1887.

40 And on the trial of said motion to remand it was contended on behalf of said J. M. Lockhart, plaintiff in said suit, and moving to remand the same; that under the Act of Congress of March 3d, 1887, relative to the jurisdiction of the Courts of the United States and the removal of cases, it was not competent for said Frank Morey, defendant in said suit, and a resident and citizen of the State of Louisiana, to remove said suit from the said Court of the State of Louisiana into this Court. And on behalf of said Frank Morey it was contended, that he was entitled to remove said suit under the Act of Congress of March 3d, 1875, relative to the jurisdiction of the Courts of the United States and the removal of cases, and to this contention on behalf of said Frank Morey, defendant, seeking to remove, it was replied that the said Act of Congress of March 1875, was superseded and repealed by, and by the effect of, the said Act of Congress of March 3d, 1887.

The question which thus arose on the motion to remand and was presented for the decision of this Court, was this, viz., "can a defendant being a resident and citizen of the State in whose Court he is sued by an alien, said suit having been instituted and begun on April 1st, 1887, remove said suit from said State Court into the Circuit Court of the United States for the district embracing the said State Court, the said removal being demanded solely on the ground that the plaintiff in said suit is an alien, and the defendant therein a citizen of the State wherein the suit is brought?"

This question having been fully argued before the said

Judges hereinabove named, and the said Judges
41 having disagreed and being opposed in opinion as to the proper decision of said question, one of said Judges holding that the defendant in the case stated was entitled to remove, and the other Judge holding that he was not entitled to remove, the point on which they disagreed and are opposed in opinion is hereby stated by the said two Judges during the same term, at the request of the said F. Morey, defendant; the said point of difference being as follows, viz:

Whether in a suit instituted and begun in a State Court on April 1st, 1887, and since the passage of the aforesaid Act of Congress of March 3d, 1887, relative to the jurisdiction of the Courts of the United States and removal of causes, the defendant in said suit being a citizen and resident of the State wherein said suit is instituted, is entitled to remove said suit into the proper Circuit Court of the United States, on the sole ground that the plaintiff in said suit is an alien?

Consequently the said Judges hereby state said question and certify the same, and direct that the certificate hereof be entered of record.

(Signed) DON A. PARDEE,
Circuit Judge.
EDWARD C. BILLINGS,
District Judge.

And whereas, when such a difference occurs, the Act of Congress provides that the opinion of the pre-
42 siding Justice shall prevail and be considered the opinion of the Court for the time being (Revised Statutes, S. 650, p. 117; S. 652, p. 118).

Now, therefore, pursuant to that requirement the aforesaid Circuit Judge, as presiding Judge, proceeds to state that he is of the opinion, as follows, viz:

That the defendant, in the case above stated, is not entitled to remove from the State Court to the Circuit Court of the United States.

And accordingly that the motion herein made to remand should be granted, and this case be remanded into the said State Court in which it was instituted.

(Signed) DON A. PARDEE, Circuit Judge.

JUDGMENT.

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana. April Term, 1887.

NEW ORLEANS, Thursday, June 16th, 1887.

Court met pursuant to adjournment.

Present: Honorable Don A. Pardee, Circuit Judge.
Edward C. Billings, District Judge.

43 J. M. Lockhart
vs. } No. 11,568.
Frank Morey.

This cause came on at this term to be heard before their Honors the Circuit and District Judges, on the motion of the plaintiff to remand said cause to the State Court, whence it was removed to this Court and was argued by counsel. On consideration whereof, it is now ordered, adjudged and decreed that this cause be remanded to the State Court, whence it was removed to this Court, and that the defendant pay the costs.

Judgment rendered June 16th, 1887.

Judgment signed June 17th, 1887.

(Signed) EDWARD C. BILLINGS,
Judge.

MOTION AND ORDER FOR APPEAL.

Entered and filed June 17th, 1887.

John M. Lockhart } No. 11,568.
vs. } U. S. Circuit Court.
Frank Morey. } Eastern District of La.

Upon motion of Rouse & Grant, Solicitors for
44 Frank Morey, suggesting that he believes there is error to his prejudice in the final degree made in above named cause, the 16th day of June, 1887, and signed the 17th day of June, 1887, and that he desires to appeal therefrom to the Supreme Court of the United States; it is ordered that an appeal from said decree be and the same is hereby granted to said Morey, returnable to said Supreme Court, the second Monday of October next, said appeal to operate as a supersedeas upon his giving bond with solvent surety, in the sum of six hundred and twenty dollars, and conditioned as the

law directs; and it is further ordered, that during the pendency of said appeal the injunction heretofore granted in said cause shall remain in full force and effect the same as if said decree had not been made.

STIPULATION. Filed 17th June, 1887.

J. M. Lockhart } No. 11,568.
vs. } U. S. Circuit Court,
Frank Morey. } Eastern District of Louisiana

Whereas, an appeal has this day been granted from the decree herein rendered, returnable to the Supreme Court the second Monday of October next; it is agreed that the parties to said cause will submit the same to said Court at it next term, upon briefs, under
45 the provisions of the 20th Rule of said Court.

(Signed) ROUSE & GRANT,
Solicitors for Morey.

ANSWER TO RULE FOR CONTEMPT.
Filed 18th June, 1887.

J. M. Lockhart } No. 11,568.
vs. } Circuit Court of the United States,
Frank Morey. } for Eastern District of La.

Now into this Court come Alexander G. Frere and J. M. Lockhart, and in answer to the rule for contempt on them taken herein, say:

That respondents did not intend to act in contempt and defiance of the order and authority of this Court, but respondents were informed by their legal advisers, and believe that the jurisdiction of this Court had ceased and the injunction herein issued had fallen.

That respondents desire to purge themselves of contempt, and to say that they do now and will hereafter comply with the terms of the order and injunction which they are charged with violating, but without prejudice to the assertion of their rights and to the insistance upon their objection to the jurisdiction of this Honorable
46 Court in any proper proceeding. Your respondents in submitting to the authority and promising obedience to this Court, in no manner waiving, but still insisting on their exceptions to the jurisdiction of this

Court, to be determined in proper proceedings; but will not pending the determination of said exceptions violate out of Court any order of this Honorable Court.

Wherefore, humbly submitting themselves as above stated, respondents pray that the rule herein against them be discharged.

(Signed) JOHN M. LOCKHART.
A. G. FRERE.

Subscribed and sworn to before me this 18th June, 1887.

(Signed) T. McC. HYMAN,
Comm'r U. S. Circuit Court, E. D. of La.

RULE FOR CONTEMPT DISCHARGED.

Extract from the Minute Book, April Term, 1887.

NEW ORLEANS, Saturday, June 18th, 1887.

Court met pursuant to adjournment.

Present: Honorable Edward C. Billings, District Judge.

46½ John M. Lockhart
vs. } No. 11,568.
Frank Morey.

The rule for contempt herein taken on the 16th instant against John M. Lockhart and A. G. Frere, sheriff of the Parish of St. Mary, Louisiana, came on this day to be heard.

Present: Rouse & Grant for mover.

White & Saunders; Foster & Mentz, for respondents.

Whereupon the said respondents filed their sworn return to the court. After hearing counsel, the respondent, A. G. Frere, sheriff as aforesaid, agreed in open court to release the seizure made by him, and to withdraw the keeper placed thereon, and thereupon the court ordered, that upon the payment of the costs of this Rule by respondents, the Rule be discharged—with leave to the defendant to renew his Rule.

BOND FOR APPEAL. Filed June 20, 1887.

UNITED STATES OF AMERICA:

Know all men by these presents, that we, Frank Morey as principal, and William Kern and William Grant, as

sureties, are held and firmly bound jointly and severally unto John M. Lockhart in the sum of six
47 hundred and twenty dollars lawful money of the United States of America, to be paid to the said John M. Lockhart, his heirs, executors, administrators and assigns, for which payment well and truly to be made we bind ourselves, and each of us by himself, and each of our heirs, executors and administrators, firmly by these presents: Sealed with our seals and dated the seventeenth day of June in the year of our Lord eighteen hundred and eighty-seven.

Whereas, the said Frank Morey has this day taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the sixteenth day of June, 1887, by the Circuit Court of the United States for the Fifth Circuit holding sessions in and for the Eastern District of Louisiana, in the suit of John M. Lockhart vs. Frank Morey, No. 11,568 of the docket thereof, and signed the 17th day of June, 1887.

Now the condition of the above obligation is, that if the above bounden Frank Morey shall prosecute his said appeal to effect, and shall answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered in the presence of:

(Signed) FRANK MOREY, [L. S.]
By ROUSE & GRANT, his Attys. [L. S.]
(Signed) WM. KERN, [L. S.]
WILLIAM GRANT, [L. S.]

Bond accepted.

(Signed) DON. A. PARDEE, Judge.

48

UNITED STATES OF AMERICA.

CIRCUIT COURT OF THE UNITED STATES,

Fifth Circuit and Eastern District of Louisiana.

Clerk's Office:

I, EDWARD R. HUNT, Clerk of the Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana, *Do Hereby Certify*, That the foregoing forty-seven pages, including page 46½, contain and form a full, complete, true and perfect transcript of the Record and Proceedings had, together with all the evidence adduced on the trial of the case of John M. Lockhart vs. Frank Morey, No. 11,568 of the Docket of the said Court.

Witness my hand and the seal of said Court, at the City of New Orleans, this fifth day of October, A. D., 1887.

[SEAL] E. R. HUNT,

Clerk.

I, EDWARD C. BILLINGS, United States Judge for the Eastern District of Louisiana, do certify, that Edward R. Hunt, whose name is signed to the above certificate as Clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, was, at the time of signing said certificate, and is now the Clerk of said Court: That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such Clerk.

Given under my hand, at the City of New Orleans, in said District, this fifth day of October, A. D., 1887.

EDWARD C. BILLINGS,

Judge.

123-56

FILED.
OCT 17 1887

SUPREME COURT OF THE UNITED STATES.

No. ——

OCTOBER TERM, 1887.

FRANK MOREY, APPELLANT,

versus

JOHN M. LOCKHART, APPELLEE

Brief on Behalf of Appellant, upon the Motion to Dismiss or Affirm.

J. D. ROUSE,
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SUPREME COURT OF THE UNITED STATES.

No. ——

OCTOBER TERM, 1887.

FRANK MOREY, APPELLANT,

versus

JOHN M. LOCKHART, APPELLEE

Brief on Behalf of Appellant, upon the Motion to Dismiss or Affirm.

I.

OF THE MOTION TO DISMISS.

This case comes before this court upon a division of opinion, duly certified under the provisions of section 652, R. S., an appeal having been taken from a final decree in the cause, under section 693, R. S. The latter section expressly confers jurisdiction upon this court to review "*any* final judgment or decree in any civil suit or proceeding before a Circuit Court," under the circumstances named in the statute.

It is an advisory jurisdiction, and prior to the act of June 1, 1872 (17 statute, 196), was exercised only by

answering the question certified. The determination of the question certified did not affect the right to bring up the whole case after it was terminated in the court below. *Daniels vs. Railroad Co.*, 3 Wall. 255; *Ward et al. vs. Chamberlain et al.*, 2 Black 435; *United States vs. Bailey*, 6 Pet. 267.

Under the act of April 29, 1802 (2 statute, 159), the cause might proceed in the Circuit Court after the division arose and the question was certified, without awaiting a decision thereof, provided further proceedings could be had *without prejudice to the merits.*

The question was to be stated and certified only upon "the request of either party or their counsel." But the act of 1872 postponed the certificate until a final judgment, decree or order is entered in the suit, and makes it mandatory upon the judges then to certify any question upon which they differed in opinion, which might have been reviewed under the act of 1802.

All such cases may now be removed to this court by writ of error or appeal, according to the nature of the case. "This is the only material change from the original law." *Dow vs. Johnson*, 100 U. S. 164.

In that case it was held, as it often had been before, that the jurisdiction to answer the question certified was not dependent upon the amount in dispute, as in other cases, but was conferred in all cases without regard thereto. This decision was affirmed in *Waterville vs. Van Slyke*, 116 U. S. 699.

The purpose of the act of 1802 was to further the ends of justice by providing for a decision of a question arising in the progress of a trial, upon which the

judges disagreed. The judges might be equally learned in the law, and the opinion of neither was allowed to prevail.

"The defect consisted in the delays it created by frequently suspending proceedings in the midst of a trial. To obviate this defect the first section of the act of June, 1872, was passed. requiring the case to proceed, notwithstanding the division, the opinion of the presiding justice to prevail for the time being." *Dow vs. Johnson, supra.*

Prior to the act of 1872 the opinion of the presiding justice did not "prevail for the time being," nor until concurred in by this court. Neither under that act does it prevail beyond the time allowed to the party cast to remove the case to this court, with supersedeas, after final judgment or decree. The provision does not create any presumption that the opinion of the presiding justice is correct, and that of the junior judge incorrect, but, from the necessities of the case, gives the opinion of the senior judge precedence until this court shall determine the point. The provision for review of the question by this court is founded upon the theory that the superior judge may err in his opinion, and that no man should be finally cast in his suit where two learned judges disagree if he shall see fit to appeal to the umpire, which this court is constituted by this act. In *Dow vs. Johnson, supra,* this court reversed the judgment rendered in accordance with the opinion of the presiding judge. Hence the justice of the rulings of this court, that in such cases the right of review is given by the statute in all cases, and that the restrictions upon the jurisdiction of this court in other cases are inapplicable.

While the judgment denying the jurisdiction of the Circuit Court is final for the purposes of appeal, yet, because of the difference of opinion between the judges, it is provisional, and after appeal so remains until this court answers the question certified.

The jurisdiction to decide in such cases was not conferred by section 5 of the act of March 3, 1875; that act simply authorized appeals and writs of error in the cases specified, where no division of opinion existed. The repeal of that provision by the act of March 3, 1887, did not affect the jurisdiction to answer questions certified. Prohibiting the allowance of an appeal or writ of error from the decision of a Circuit Court, remanding a cause to the State court, whence removed, does not relieve the judges of the circuit from the duty imposed upon them by the act of 1872, of certifying the fact of a division of opinion between them upon any question arising in the cause, as well as the question upon which they were so divided. Neither does it take away from this court jurisdiction to determine such questions. To so hold would be to limit the jurisdiction of this court by implication from a statute which, both in its title and in its body, is declared to be an amendment of the act of March 3, 1875, determining the jurisdiction of the Circuit Courts, etc. We submit that the jurisdiction of this court can neither rest upon nor be taken away by implication.

All that portion of section 2 of the act of March 3, 1887, printed in italics in appendix to 120 U. S. Rep., pp. 790 and 791, relates to the removal of suits because of local prejudice. It provides first for the re-

moval, when it shall be made to appear *to the Circuit Court* that, from prejudice or local influence, the applicant for removal will not be able to obtain justice in the State courts. Having referred application for removal upon this ground, subsesequent to the passage of the act, to the Circuit Court, the section then requires that court to determine the existence of the prejudice in cases already removed upon the affidavit of the party filed in the State court, whether such suit be already pending in the Circuit Court or be thereafter entered therein. If, upon the examination of said Circuit Court into the truth of said affidavit and the grounds thereof, it does not appear to the satisfaction of that court that the party will not be able to obtain justice in the State court, it shall cause the same to be remanded thereto. Having ordered the cause to be remanded because improperly removed, the statute wisely provides that such order shall be immediately carried into execution, and no appeal or writ of error from such decision allowed. This provision relates exclusively to the case in hand, by the legislator—a case *improperly* removed. The removal was *effected* under the former law in such cases, by making and filing the requisite affidavit and bond. The falsity of the affidavit being established, the jurisdiction was obtained by fraud, the cause was improperly removed, and the law authorized the court to restore the case to the court which had been imposed upon. Oftentimes such applications are made for delay ; hence, the propriety of immediately executing the order remanding the case.

The motion to dismiss should be denied.

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The motion to dismiss should be denied.

II.

OF THE MOTION TO AFFIRM.

This case was removed into the Circuit Court, under the provisions of section 2 of the act of March 3, 1875.

The judges were divided in opinion whether such a suit could be removed since the passage of the act of March 3, 1887. The latter act declares in its title that it is amendatory of the act of 1875. The first and third sections of the last named act are amended by the substitution of the new act, declaring that these sections are "hereby amended so as to read as follows."

The second section of the act of 1875 is not mentioned or included in the repealing clauses, unless by implication. The sixth section of the act of 1887 expressly repeals the last paragraph of section 5 of the act of 1875 and section 640 of the Revised Statutes. It also provides that "all laws and parts of laws *in conflict with the provisions of this act* be and the same are hereby repealed."

The same repeal provision is found in section 10 of the act of 1875, and its effect was considered by the court in Hess vs. Reynolds, 113 U. S. 73. Mr. Justice Miller then said: "This implies very strongly that there may be acts on the same subject which are not repealed."

It is contended by mover that the same section of the act of 1875 is repealed in all of its parts by the act of 1887, because it makes provision for the removal of certain specified causes, thereby regulating the whole subject of removal and repealing all prior laws on the subject by implication.

The argument is, that though, under the act of 1875, a suit wherein an alien was plaintiff and a citizen of the

State was defendant might have been removed, it cannot be removed since the act of 1887, because not specially provided for therein.

Hess vs. Reynolds, *supra*, is a complete answer to this proposition.

So, in Venable vs. Richards, 105 U. S. 636, it was contended that the act of 1875 repealed section 643 of the Revised Statutes. But this court said that the act of 1875, "neither in terms nor by necessary implication, abrogated previous laws providing for the removal of causes from the State courts. It repeals only such acts and parts of acts as are in conflict therewith."

And in this connection we call attention to the act of 1875, which, by its title and in its form, would appear to be an original act, covering the whole ground of jurisdiction. The act of 1887, however, merely purports to be an amendment of it, and repeals only so much of the original as conflicts with its express provisions.

"It, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be." State vs. Stoll, 17 Wall. 425.

The second section of the act of 1875 authorizes the removal of cases in which there is a controversy between an alien and a citizen of a State, or in which there is a controversy between citizens of the same State claiming lands under grants of different States. The amendatory act of 1887 omits these classes of suits, but does not expressly exclude them from the right of removal, nor should it be held to exclude them by intendment.

The whole purpose of the amendment was to restrict the right of removal in the cases mentioned, and not to abrogate existing provisions of the law relating to others not specified.

If the intention had been to substitute a new set of laws, as contended for, congress would have repealed the old as a whole, and not such parts only as were inconsistent.

The debates in congress show that the act of 1887 was passed as an amendment to the act of 1875, to correct certain alleged abuses which had grown up under it. This intent is also shown by the act itself, which throughout merely purports to be an amendment of the old one.

It seems clear in principle that an amendatory act cannot be considered a substitute for the one amended, except so far as it makes some new provision in lieu of the old ones, necessarily excluding them, or unless the former law is expressly repealed.

If a suit involving a controversy between a citizen of a State and a foreign State had been mentioned in the act of 1887, and some enactment made touching its removal, the provision of the old act relating thereto would have been necessarily repealed by implication. But the act is silent as to such a case, and being silent, is not inconsistent with the act of 1875 granting a right of removal.

The motion to affirm, for these reasons, should be denied.

Respectfully submitted,

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Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES

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I.

STATEMENT OF CASE.

J. M. Lockhart, a citizen of Great Britain, brought suit in the State District Court of St. Mary Parish, Louisiana, to foreclose, by executory process, a mortgage which he held on property of Frank Morey, a citizen and resident of Louisiana.

This suit in the State Court was instituted after the passage of the Judiciary Act of March 3d, 1887.

The defendant, Morey, petitioned the State Court to remove the case into the United States Circuit Court. The petition was denied. Thereupon Morey had a transcript prepared and filed in the Circuit Court, in which he also applied for an injunction restraining Lockhart from further proceeding in the State Court.

Lockhart at once moved to remand the case from the Federal Court to the State Court. This motion was first heard by the District Judge, who ruled that it should be denied. An applica-

tion for a rehearing of the motion to remand was then made and argued before the Circuit and District Judges sitting together. The result was a division of opinion. The Circuit Judge held that the case was not transferable and should have been remanded. The District Judge adhered to his opinion that the Circuit Court had jurisdiction under the Act of 1875, which he considered was not repealed or modified, in respect to the parties entitled to remove, by the Act of 1887.

Such division existing, the opinion of the Circuit Judge became, of course, the judgment of the Court. The case, therefore, now stands in the lower court as on a judgment ordering the case to be remanded to the State Court. From this judgment the original defendant, Morey, has appealed to this Court by writ of error.

II.

Statement of Division of Opinion.

"J. M. Lockhart, *versus* Frank Morey. } No. 11,568. Circuit Court of the United States for the 5th Circuit and Eastern Dist. of Louisiana.

"This case was brought in a State Court, viz., in the District Court for St. Mary Parish, State of Louisiana. The plaintiff is a citizen of Great Britain, and the defendant is a citizen and resident of the State of Louisiana.

"The defendant petitioned the said State Court to remove said suit into this Court, but the said State Court refused to grant the removal. Thereupon, the said defendant obtained and filed in this Court a certified copy of the proceedings in said suit in said State Court. Then the said plaintiff in said suit moved, immediately after the filing of said transcript in this Court, to remand said suit from this Court into the said Court of the State of Louisiana in which it was instituted.

"Said motion to remand came up for hearing, and was tried and argued in this Court before Honorable Don A. Pardee, Cir-

cuit Judge for the Fifth Circuit Court of the United States, and Honorable Edward C. Billings, District Judge for District Court of the United States for the Eastern District of Louisiana, in June, 1887.

"And on the trial of said motion to remand it was contended on behalf of said J. M. Lockhart, plaintiff in said suit, and moving to remand the same, that under the Act of Congress of March, 1887, relative to the jurisdiction of the Courts of the United States and the removal of cases, it was not competent for said Frank Morey, defendant in said suit, and a resident and a citizen of the State of Louisiana, to remove said suit from the said Court of the State of Louisiana into this Court. And on behalf of said Frank Morey, it was contended that he was entitled to remove said suit under the Act of Congress of March, 1875, relative to the jurisdiction of the Courts of the United States and the removal of cases. And to this contention on behalf of said Frank Morey, defendant seeking to remove, it was replied that the said Act of Congress of March, 1875, was superseded and repealed by, and by the effect of the said Act of Congress of March, 1887.

"The question which thus arose on the motion to remand and was presented for the decision of this Court, was this, viz: 'Can a defendant, being a resident and citizen of the State in whose Court he is sued by an alien, said suit having been instituted and begun on — 1887, remove said suit from said State Court into the Circuit Court of the United States for the district embracing the said State Court, the said removal being demanded solely on the ground, that the plaintiff in said suit is an alien, and the defendant therein a citizen of the State wherein the suit is brought?'

"This question having been fully argued before the said Judges hereinabove named, and the said Judges having disagreed and being opposed in opinion as to the proper decision of said ques-

tion, one of the Judges holding that the defendant in the case stated was entitled to remove, and the other Judge that he was not entitled to remove, the point on which they disagree and are opposed in opinion is hereby stated by the said two Judges, during the same term, at the request of the said F. Morey, defendant; the said point of difference being as follows, viz: 'Whether in a suit instituted and begun in a State Court in 1887, and since the passage of the aforesaid Act of Congress of March, 1887, relative to the jurisdiction of the Courts of the United States and removal of cases, the defendant in said suit being a citizen and resident of the State wherein said suit is instituted, is entitled to remove said suit into the proper Circuit Court of the United States, on the sole ground that the plaintiff in said suit is an alien?'

"Consequently, the said Judges hereby state said question and certify the same, and direct that the certificate hereof be entered of record.

(Signed) DON A. PARDEE,
E. C. BILLINGS.

"And whereas, when such a difference occurs, the Act of Congress provides that the opinion of the presiding justice shall prevail and be considered the opinion of the Court for the time being (Rev. Stat. § 650, p. 117; § 652, p. 118).

"Now, therefore, pursuant to that requirement, the aforesaid Circuit Judge, as presiding Judge, proceeds to state that he is of the opinion, as follows, viz:

"The defendant, in the case above stated, is not entitled to remove from the State Court to the Circuit Court of the United States; and accordingly that the motion herein to remand should be granted, and this case be remanded into the said State Court in which it is instituted."

III.

Motion to Dismiss.

The appellee files a printed copy of the record in this Court and moves to dismiss the appeal on the following grounds, viz:

That under the express terms of the Judiciary Act of March 3d, 1887, this Court is without jurisdiction to review, in any form of appellate proceedings, a judgment of a Circuit Court remanding a case from such Court to the State Court in which it originated.

The Constitution ordains that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make. "Under the power thus expressly vested in it, Congress has seen fit to enact in the Judiciary Act of March 3d, 1887, that the Supreme Court shall have no appellate jurisdiction to review the decision of a Circuit Court ordering the remand of a case to a State Court.

"Wherever any cause shall be removed from any State Court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution, *and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed.*"

The provision just cited is broad, emphatic and unexcepting in its terms. Every known form of appellate relief is by name denied. No distinction, *quoad* the right of appeal, is made or intimated in respect to the form of the decision or the manner in which it is reached. When the question has been presented and decided, that decision is *in all cases* to be final and unappealable. The Statute does not distinguish and provide that the decision shall be unappealable when pronounced by a single Judge, but shall, on the other hand, be appealable if two Judges sit together and there is a division of opinion between them.

This distinction is not found in the words of the law; on the contrary, *all* decisions on this particular matter are without any exception or reservation placed in one and the same category. As the law itself does not give one class of decisions on this point a different character and different consequences from other classes of decision on the same point, it follows they must all be treated alike. *Ubi lex non distinxit, ibi non distinguet judex.*

Then, by what process of reasoning did the learned Judge *a quo* reach the conclusion that a writ of error lies in this case?

Referring to § 650 of the Revised Statutes, it will be seen that it is there provided, that, when two Judges sit together in the Circuit Court, and cannot agree, then "the opinion of the presiding Justice or Judge *shall prevail*, and be considered the *opinion of the Court for the time being.*" Now, the Judge *a quo* considered that the words "*for the time being*" indicated that Congress intended that this judgment should always be provisional only in its character and always subject to appeal. Even conceding that the Act of 1872, now embodied in § 650, did thus intend, still it is clear that the entire matter remained subject to subsequent congressional regulation and modification. The Act of 1872 was not irrepealable. And we submit, that if it originally had the sense in which it was taken by the Judge *a quo*, then to that extent it has been repealed by its conflict with the Judiciary Act of 1887. For the latter Act, in its regulation of a particular class of decisions, denies in all cases the right of appeal from the decision of the lower court, without any distinction as to the constitution of that Court at the time the decision was rendered. It was the plain intent of Congress that in these cases there should be no appeal. The Act of 1887 is, therefore, an express regulation of a particular subject matter. It repeals by implication all former regulations which bear upon that matter in such manner that either the subsequent regulation must be restricted in its effect, or the former regulations must be

restricted in their effect. Either, then, the Act of 1887 is limited and overruled by § 650, as understood by the Judge *a quo*, or § 650, in that sense, is limited and overruled by the Act of 1887. For the Act of 1887 denied the right of appeal from decisions on motions to remand in *all* cases, without specifying or excepting any; § 650, as understood, would grant the right of appeal in all cases, not only from decisions on motions to remand, but from decisions on all questions whatever that can be presented in the Circuit Court. The earlier law is supposed to regulate the right of appeal when two Judges sit together and differ in opinion. The later law in direct and unequivocal terms regulates the right of appeal in a particular class of cases, without any reference whatever to the constitution of the Court when rendering its decision. If the earlier law is to continue to have the sense attributed to it, then the later law is less broad in its effect than its terms imply; it will be modified and narrowed by a prior law.

Now, when one of two laws must suffer a restriction from the other, we submit that the later in date will prevail. We, therefore, contend that the Act of 1887 is to be enforced just as it is written, by denying the right of appeal in all cases on motions to remand.

Before leaving this branch of the case, we would suggest that the words "for the time being" do not in fact have the sense attributed to them by the Judge *a quo*. They were, we submit, used with reference to interlocutory opinions, pronounced during the trial of a case.

We submit, therefore, that this appeal should be dismissed, on the ground that this Court is without jurisdiction to entertain it under the express terms of the Act of 1887.

IV.

Motion to Affirm.

Should this Court hold that it has jurisdiction to entertain the

appeal, then we move that it affirm the judgment appealed from, on the ground that it is obviously correct, and necessitated by decisions of this Court.

The Act of 1887 gives the right to remove in cases not federal to *defendants being non-residents of that State; i. e.*, of the State in which the suit is brought.

Now, Mr. Morey was and is both a citizen and a resident of Louisiana. And no federal question is stated or involved in the case. It is clear, then, that under the Act of 1887, Mr. Morey has no right to remove. But it is contended that the Act of 1875 is not, on this point, repealed by the Act of 1887.

This contention is based on what we consider is a misapprehension of the principles of interpretation announced in the case of *Hess vs. Reynolds, 113 U. S. 78.* That case, together with the case of *King vs. Cornell, 106 U. S. 395*, indeed settle this matter in the opposite sense to that for which our opponents contend. A brief review of the cases and of the statutes under which they were decided will show this.

Just prior to 1875, the law regulating the matter of removals was contained in the three paragraphs of § 639 of the Revised Statutes of the United States.

The *first* of these paragraphs regulated the removal of *entire* controversies. It conferred the right to remove on the defendant being an alien or citizen of a State other than that in which the suit was brought.

The *second* paragraph regulated the removal of *separable* controversies. It conferred the right to remove on the defendant being an alien or citizen of a State other than that in which the suit was brought.

The *third* paragraph regulated the removal of cases arising *under the local prejudice Act of 1867.*

Such was the law when the jurisdiction and removal Act of 1875 was passed.

The second section of this Act contains two sentences or clauses relative to the subject of removal.

The *first* of these clauses relates to the removal of *entire* controversies. It confers the right to remove on both plaintiff and defendant in any case commenced in a State court, whereof the Circuit Court might have had original jurisdiction.

The *second* clause relates to the removal of *separable* controversies. In this case the right to remove is conferred upon citizens, and no mention is made of aliens, either as having or as not having the right to remove a separable controversy.

The Act of 1875 contains no clause regulating or referring to the removal of cases *under the local prejudice Act.*

Comparing § 639 and the Act of 1875, we see:

1st. That each contains a provision relative to the removal of *entire* controversies.

2d. That each contains a provision relative to the removal of *separable* controversies.

3d. That the earlier law (§ 639) contains a provision relative to the removal of cases under the local prejudice Act, while the latter law (Act of 1875) contains no such provision.

Now, the repealing clause of Act of 1875 is as follows:

"That all Acts and parts of Acts *in conflict with the provisions of this Act* are hereby repealed."

The Supreme Court of the United States has been called upon in two cases to decide on the effect of this repealing clause, and to determine the extent to which the Act of 1875 repeals § 639.

The first case was that of *King vs. Cornell*, 106 U. S. 395. King, an alien, was sued with citizens of the same State as the plaintiff. The controversy was separable as to King, and he desired to remove it into the Federal Court. Now, alien defendants had the rights to remove separable controversies under § 639. But under the Act of 1875, aliens are neither mentioned

as having or as not having the right; only citizens are spoken of in connection with the removal of separable controversies.

It was argued in that case, just as it is now argued in this, that there was no inconsistency between the former law and the later. The former might stand, it was urged, without prejudice to the later. For the former mentioned two classes of persons as entitled to the right to remove, while the later only mentioned one, but did not exclude the other, nor limit the right to remove to the one class mentioned. And the former law was declared to be repealed only in so far as inconsistent with the later.

But the Supreme Court refused to adopt this view. They held that the provision of the later law was a regulation of the same thing that was regulated by the former law.

The decision in *King vs. Cornell* may be briefly stated thus:

Where two laws of different dates contain regulations of the same matter, viz., the removal of entire and separable controversies, the regulation in the later law supersedes and tacitly repeals the regulation in the earlier law. This repeal does not result from any *actual or expressed conflict* between the provisions of the two laws. It results from the presumption that the Legislature did not intend to have *two different sets of regulations for the same matter.* Under this presumption, the continued existence of the prior regulations is *in conflict with the legislative will.* The establishment of the new and express regulation on the particular matter covered by the Act, implies the intention to do away with and abolish the regulation that had previously existed as to such matter.

Observe: The Court is determining the effect of a set of *expressed regulations* of a given matter on another set of *expressed regulations* of the same matter in a former Statute. The later Statute does not, in connection with this matter, mention the earlier. It would, moreover, be possible to maintain and enforce the provisions of both Statutes, without detriment to either. But

the Court holds that the establishment of the later set of *express* provisions *ipso facto* repeals the earlier set on the same matter. Express mention of or reference to the earlier set is not required. Neither is it necessary that the earlier set should be in actual conflict with or repugnant to the later set. Whether mentioned or not, whether repugnant or not, the earlier set is abolished by the later set. The same space cannot be occupied by two things at once. The same object of judicial regulation is not, in the absence of a distinct and unmistakable expression of legislative intent to that effect, subjected to two different *express* sets of regulations. This is the general rule of construction. And the Supreme Court of the United States has, in this case of *King vs. Cornell*, declared that it obtains in relation to two different sets of express regulations of the matter of removing cases from State to Federal Courts. The later express set of regulations of this matter supersedes the earlier express set.

But, it is urged, the subsequent case *Hess vs. Reynolds, 113 U S. 78*, is in conflict with the decision in *King vs. Cornell.*

An examination of the two cases shows that they in no manner conflict.

As we have seen, the Act of 1875 contained no *regulation* or even *mention* of the the matter of removing cases under *the local prejudice* Act. Art. 639, on the other hand, did contain an elaborate and minute regulation of this matter.

The question in the *Hess vs. Reynolds* case, then, was, did the *absence* of legislation in the later Act impliedly repeal the *express* legislation in the former Act? The Court held that such implied repeal did not ensue.

It is obvious that this case differs *toto coelo* from the *King vs. Cornell* case.

In the *King vs. Cornell* case, the Court determines the effect of a subsequent *express* regulation on a *prior* express regulation. And they hold that the subsequent express repeals the prior

express, because the subsequent must be taken to have been intended as a substitute for the prior.

In the *Hess vs. Reynolds* case, the Court determines the effect of the *absence* of subsequent express regulation on a prior express regulation. Under the very terms of the repealing clause, such *omission* of subsequent regulation could affect prior regulations only where there is in some manner an inconsistency in the former and the later law. And so the Supreme Court hold.

In the first case, the Court considers, with reference to their effect on each other, two different sets of regulations, each existing by *express enactment*, and both relating to the same subject matter.,

In the second case, the Court considers the existence of regulations in an earlier Statute with reference to their non-existence in a later Statute.

In the first case, the Court compares and reasons on *two affirmative facts*, existing in two different Statutes.

In the second case, the Court compares and reason on *an affirmative fact* existing in one State, and the *non-existence* of that fact in a later Act.

This comparison of the two cases shows that there is no conflict between them, because they were on different states of facts. Each case is authority in the appropriate state of facts and law.

Nor is it lightly to be assumed that in so important a matter the Supreme Court would have, without being aware of the fact, contradicted itself in the short space of three years. The presumption rather is that its two utterances consist. And this presumption is raised to a moral certainty when we find the Court which pronounced the two decisions citing them afterwards in the same line, each as authority for the point settled by it, and apparently without the remotest suspicion that any interpretation could even suggest an inconsistency between them. *R. R. Co vs. Bates, 119 U. S. 467.*

We assume, then, that there is no conflict between the cases, and that *King vs. Cornell* furnishes the rule whereby to determine the effect of a subsequent express regulation on a prior express regulation, whereas, *Hess vs. Reynolds* determines the effect of subsequent non-regulation on prior express regulation.

Let us next compare the Statute of 1887 with the Statute of 1875 and with Art. 639 of the Revised Statutes of 1873.

Art. 639 contained an express regulation of the removal of entire and separable controversies.

The Act of 1875, in Section 2, also contained an express regulation of the same matter, but made no reference to or mention of the prior law.

It is held in *King vs. Cornell*, that the mere fact that there is an express regulation of the same matter in the Act of 1875, repeals the prior express regulation of that matter in Art. 639, although that Article was not referred to and might have been enforced without conflicting with the Act of 1875.

Now the Act of 1887 contains an express regulation of precisely the same matter which was formerly regulated by Art. 639 and then by the Act of 1875. It is as complete a regulation as is contained in either of the former Statutes. It does not, perhaps, as the Statute stands, refer to the pre-existing regulation in the Act of 1875.

Then, why does not the rule announced in *King vs. Cornell*, in relation to Art. 639 and the Act of 1875, equally apply in relation to Act of 1875 and the Act of 1887?

How can the Act of 1875 tacitly repeal Art. 639, and yet not be itself tacitly repealed by the Act of 1887?

The same reasoning which led the Supreme Court to hold that the Act of 1875 tacitly superseded and repealed Art. 639, in respect to the removal of entire and separable controversies, compels us to conclude that the Act of 1887 in like manner tacitly superedes and repeals the Act of 1875 on these same points. For